No. 86-2009

Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ITEL CONTAINERS INTERNATIONAL CORP.;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED; TRANSAMERICA ICS, INC.;
and NAUTILUS LEASING SERVICES, INC.;
Petitioners

vs.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents

Brief Of Institute Of International Container Lessors, Ltd., As *Amicus Curiae* In Support Of Petition For Writ Of *Certiorari* To The United States Court of Appeals For The Ninth Circuit

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July 23, 1987

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Institute of International Container Lessors, Ltd. (IICL) submits this brief *amicus curiae* with the consent of the parties. The IICL, the trade association for the international marine container leasing industry,[1] includes most of the world's large container leasing companies and some of the smaller ones.

IICL member companies lease marine cargo containers to shipping lines for ocean transportation of manufactured goods, raw materials, and agricultural products. The world population of containers is now above five million TEU,[2] and containers have become the world's chief method of ocean carriage of manufactured cargo.[3] Container lessors own 50.8% of the world's container fleet,[4] while virtually all of the remainder is directly owned by ocean carriers. The total United States container population is approximately 1.9 million TEU, of which more than 1.4 million TEU (77%) is owned by American leasing companies.[5]

As supplier of more than half of the containers used by the world's ocean carriers, the container leasing industry is essential to ocean commerce. Container lessors thus have an

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[1] A list of IICL members appears as Exhibit A. IICL is a Delaware nonprofit membership corporation with headquarters in New York. IICL previously has been granted the privilege of *amicus* status by this Court in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

[2] CONTAINERIZATION INTERNATIONAL YEARBOOK 16 (1987). TEU is an acronym for Twenty-foot Equivalent Unit. Containers are internationally standardized at two fungible sizes, twenty feet and forty feet. TEU is a measure of container fleet size: one 20-foot container is one TEU; one forty-foot container is two TEUs.

[3] World port container traffic increased from 15,031,000 TEUs handled in 1973, CONTAINERIZATION INTERNATIONAL YEARBOOK 11 (1973) to 55,789,000 TEUs in 1985. CONTAINERIZATION INTERNATIONAL YEARBOOK, *supra* note 2 at 7 (1987).

[4] CONTAINERIZATION INTERNATIONAL, WORLD CONTAINER CENSUS (SEPT. 1986).

[5] UNITED STATES MARITIME ADMINISTRATION, INVENTORY OF AMERICAN INTERMODAL EQUIPMENT 48 (1986).

inextricable interest in the United States general maritime law and, in particular, in their rights under the U.S. Maritime Lien Act.[6]

Ocean carriage of cargo in containers is only a generation old, and the container leasing industry is only perhaps half that age.[7] Nevertheless, the U.S. general maritime law has accommodated the new technology and the new leasing industry. In sharp contrast, the decision below[8] freezes the development of the law. Indeed, the decision turns the clock back four generations, to a time when ships were powered by coal and cargo was carried in burlap bags.

The United States, generally, is the most important trading partner of each of the world's industrialized nations. Hundreds of ships call at U.S. ports each day. Typically, a container vessel is on liner trade and calls on several U.S. ports in the course of a voyage. If the decision below is permitted to stand, a container lessor who wishes to arrest a vessel *in rem* in order to execute its maritime lien will be forced to wait until the vessel calls at a port outside the Ninth Circuit. Because the Ninth Circuit encompasses all U.S. ports on the Pacific Ocean, container lessors will be precluded from arresting vessels which ply only the Pacific trade routes, while they may take advantage of maritime lien rights against vessels that call at ports in the U.S. Gulf, East Coast, and Great Lakes. This disparity creates a tension in the general and otherwise uniform U.S. maritime law and encourages forum shopping. It also places lessors whose lessees chiefly trade in the Pacific at a serious disadvantage.

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[6] Maritime Lien Act, 47 U.S.C. §§971-75 (1982) (hereinafter the "Act").

[7] The birth and growth of containerization to its present dominant position in ocean carriage is set out in Quinn, *Ocean Container Leasing and Maritime Liens: An Example of Flexibility in U.S. General Maritime Law*, 18 J. MAR. L. & COM. 1 (1987) (hereinafter "Ocean Container Leasing and Maritime Liens").

[8] Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd., 808 F.2d 697 (9th Cir. 1987)(hereinafter "Char Ching"), at Petitioners' Brief Appendix C (hereinafter "Pet. Brief App.").

The issue in this case surrounds the word "furnishing" as used in the Act.[9] The case under review construed "furnishing" in such a way as to deny a lien for necessaries actually used on an arrested vessel unless the lien claimant had foreknowledge of the specific identity of the vessel prior to its use of the necessary.

Amicus believes it desirable that this Court return to an issue last addressed by this Court sixty-seven years ago in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920) (hereinafter "*Piedmont*"), so as to clarify the law and to make clear the right of container lessors, who furnish containers to ocean carriers, to a maritime lien. This Court's decision in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940) (hereinafter "*Dannebrog*") was the last to consider *any* aspect of suppliers' maritime liens, holding that suppliers did not waive their lien if they looked simultaneously to the credit of the vessel which they had furnished and to the vessel's owner. *Piedmont*, however, was this Court's last decision addressing the question of "furnishing" under the Act.

Amicus urges that this Court grant the requested writ of *certiorari* and reverse the Ninth Circuit.

SUMMARY OF ARGUMENT

This Court should grant petitioners' writ of *certiorari* because the panel majority opinion in the Court of Appeals conflicts with

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[9] Section One of the Maritime Lien Act, as amended, 46 U.S.C. §971 (1982), provides that:

> [a]ny person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

decisions of this Court, with decisions in other courts of appeal, with the language of the Act, and with Congress' intent in drafting the Act. Further, the opinion warrants review because it raises an important question of admiralty law concerning when a maritime lien for necessaries arises (confused by the opinion in *Piedmont*) and because it has made disuniform the developing, but heretofore uniform, maritime law that a maritime lien arises from the breach of a lease of ocean cargo containers.

The opinion conflicts with this Court's decisions and with those of other circuits because it imposes upon maritime suppliers of necessaries a new prerequisite for a maritime lien on vessels which they supply. This Court and other circuits have held that a maritime lien arises where 1) the vessel owner, master, or authorized agent has contracted for necessaries on the credit of the vessel, and 2) the necessaries reach the ship.

This case now declares that there will be no lien unless the supplier furnishes necessaries directly to the ship and, beforehand, has designated each specific ship to receive the necessaries.

The opinion further conflicts with this Court's and other circuits' decisions because it holds that no maritime lien will arise from the furnishing to a vessel of new kinds of necessaries, although maritime law long has recognized that the supply of necessaries supports a maritime lien. Ignoring the celebrated capacity of maritime law to adapt to technological advances, the Court of Appeals rejects a maritime lien in connection with the modern furnishing of oceangoing containers and instead turns the clock back four generations.

The Court of Appeals opinion also runs afoul of the express language of the Maritime Lien Act and Congress' intent in passing the Act. The opinion concludes that Congress intended with the Act to change the existing maritime law and require a supplier to deliver goods or services directly to a prespecified vessel. The legislative history is explicit that Congress did not so intend. Moreover, the opinion, in essence, requires a supplier

to prove that the supplier relied on the credit of a specific vessel, which is directly contrary to the Act.

Finally, the writ presents an appropriate occasion to clarify *Piedmont*, which has served for sixty-seven years only to confuse the important question of the meaning of "furnishing" as used in the Act.

ARGUMENT

I.

The Court of Appeals Decision Conflicts with the Decisions of This Court and of Other Courts of Appeal Because It Denies Maritime Liens to All Suppliers Save Those Who "Furnish" Necessaries Directly to a Prespecified Vessel.

Under this Court's opinions beginning in the early nineteenth century, suppliers who furnish necessaries to a vessel and who meet two requirements have a maritime lien against the vessel. First, the supplier must form a contract with the vessel (through her master, owner, or authorized agents) under which the vessel is hypothecated in exchange for the necessaries.[10] Second, the contract must be executed by the actual use of (or receipt of) the necessaries by the ship.[11] Congress neither changed nor

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[10] The Kalorama, 10 Wall. (77 U.S.) 204, 210 (1869); The Yankee Blade, 19 How. (60 U.S.) 82, 91 (1857); Peyroux v. Howard, 7 Pet. (32 U.S.) 324, 341 (1831); The Aurora, 1 Wheat. (14 U.S.) 96, 102 (1816)(Story, J.); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 635-37 (2D ED. 1975) (hereinafter "GILMORE & BLACK"); A. JENNER, B. CHASE, & J. LOO, 2 BENEDICT ON ADMIRALTY 3-34 to 3-37 (1975 & SUPP. 1986) (hereinafter "BENEDICT ON ADMIRALTY").

[11] *Id.* An enduring doctrine is that admiralty will refuse to grant relief from a breach of an executory contract. *See* GILMORE & BLACK, *supra* note 10 at 635-37; 1 BENEDICT ON ADMIRALTY, *supra* note 10 at 11-12 to 11-16.

intended to change these requirements when it passed the Maritime Lien Act in 1910 or when it amended the Act in 1920[12] and in 1971.[13]

The verb "to furnish" appears in various forms in this Court's pre-Act opinions addressing maritime suppliers' liens,[14] and also appears in the Act.[15] Legislative history does not provide any basis for assigning particular significance to the use of the verb "to furnish" in the Act, but its origin is most likely this Court's prior opinions.

This Court's pre-1910 opinions articulate two purposes for the requirement that suppliers "furnish" necessaries to a vessel in order to have a maritime lien. First, when a supplier "furnished" goods or services to a vessel, that provided some evidence that the supplier had relied on the credit of the vessel. Second, when the necessaries actually reached or were used by the vessel, that served to execute the contract which to that point had remained executory.

With the Act, Congress provided that the supplier was presumed to have a maritime lien on a vessel to which he had furnished necessaries.[16] In eliminating the requirement that a

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[12] Act of June 5, 1920, Ch. 250, §30, Subsec. P, 41 Stat. 1005.

[13] Act of August 10, 1971, Pub. L. 92-79, 85 Stat. 285.

[14] *See* The Kalorama, 10 Wall. (77 U.S.) at 210 ("By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessaries . . .."); The Belfast, 7 Wall. (68 U.S.) 624, 643 (1868)("Material-men, also, who furnish materials or supplies to a vessel . . . have a maritime lien on the vessel . . .."); Peyroux v. Howard, 7 Pet. (32 U.S.) at 341 ("Where repairs have been made, or necessaries furnished . . .."); The General Smith, 4 Wheat. (17 U.S.) 438, 443 (1819)(Story, J.) ("Where repairs have been made, or necessaries furnished . . ..").

[15] "Any person furnishing . . . necessaries, to any vessel . . . shall have a maritime lien on the vessel . . .." 46 U.S.C. §971 (1982). Congress intentionally declined to define the term. *See infra* at 12-14.

[16] The Act provides that, in order to establish a maritime lien, "it shall not be necessary [for the supplier of necessaries] to allege or prove that credit was given to the vessel." 46 U.S.C. §971 (1982).

supplier prove that he had relied on the credit of the ship, the statute by reasonable implication eliminated any requirement that the supplier "furnish" necessaries directly to a preordained vessel. The chief purpose of the "furnishing" requirement since passage of the Act has been to ensure that the necessaries actually reach the vessel in order to execute the contract between the vessel and the supplier.

The Ninth Circuit's requirement that suppliers must deliver necessaries directly to a specific ship in order to have a lien on the ship conflicts with the Fifth Circuit's recent *en banc* decision in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 603 (5th Cir.), *cert. denied*, ____ U.S. ____ (1986), as well as with two other Fifth Circuit decisions, *Stern, Hays & Lang, Inc. v. M/V Nili*, 407 F.2d 549 (5th Cir. 1969)(advertising services), and *Colonial Press of Miami, Inc. v. The Allen's Cay*, 277 F.2d 540 (5th Cir. 1960) (printing services). The requirement further conflicts with a series of older court of appeals and district court decisions from the Fourth, Seventh, and Ninth Circuits, collected at 2 *Benedict on Admiralty*, *supra* note 10 at 3-35 n.18, which support the proposition that:

> [i]f supplies are delivered to the owner pursuant to the contract, it doesn't matter how they get aboard the ship as long as they eventually get there. Thus, it is sufficient if the goods are delivered alongside the ship or other convenient place provided they are ultimately used aboard the ship . . ..

Id.

However, the case under review imposes a reading on the word "furnishing" such as will deny maritime liens to all suppliers save for those who 1) predesignate the specific ship which will receive necessaries, and 2) themselves deliver the necessaries directly to the specific ship.

Leased containers are delivered to vessels through three general types of leases. The trip lease is for a particular number

of containers for a voyage, generally on one ship, from Port A to Port B. The term lease is for a specifically identified group of containers for a set term during which the shipowner can use the containers anywhere it wishes aboard any of its ships. The most important type of lease, which meets the commercial requirements of the shipowners themselves, is the master lease, in which the shipping line agrees to lease a particular (or minimum) number of containers from a lessor who agrees to make those containers available when and where needed around the world.[17] Under a master lease, the lessor has no foreknowledge of or control over which of its containers are to be used on which vessel — but both know that the specific containers are to be used on the shipowner lessee's vessels.

The Ninth Circuit reached its conclusion about the word "furnishing" in reliance upon *dicta* in *Piedmont*,[18] without considering the decisions of this Court prior to *Piedmont*, without examining the necessaries that suppliers furnish to modern vessels or the means of that furnishing, and without considering modern ocean commerce which makes normative both containers as necessaries and the method of their delivery. The Ninth Circuit ascribed unfounded significance to the form of the verb "to furnish" in the Act.[19] The gloss it placed on that grammar constitutes a break from the weight of precedent which this Court should resolve on *certiorari*.

A pointed economic conflict also parallels the legal conflict and calls equally for this Court to grant *certiorari*. In order to protect liens at ports located within the Ninth Circuit, container lessors must now "furnish" their containers, insurers "furnish" their insurance, advertisers "furnish" advertising, and other

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[17] A more extensive description of the types of leases and of the commercial movement of containers in a typical transaction is found in *Ocean Container Leasing and Maritime Liens*, *supra* note 7 at 15-17.

[18] *Amicus* discusses *infra* at 16-18 the Court of Appeals' misreading of *Piedmont*.

[19] *Amicus* discusses *infra* at 12-14 the Act's use of the verb "to furnish."

service suppliers "furnish" services directly to each *predesignated vessel* which is to benefit from those supplies or services. Neither this Court nor any other court of appeals imposes this requirement on suppliers. It represents a significant departure from previous practice and from current practice at ports outside the Ninth Circuit. In ports touching the Pacific, suppliers must now undergo additional expense while opening themselves to the risk of providing unsecured credit for necessaries. The Ninth Circuit has imposed new, impractical, and sometimes impossible operating requirements on lessors and other suppliers.

II.

The Court of Appeals Decision is Contrary to Decisions of this Court and Conflicts with the Decisions of Other Circuits Because It Denies That Liens for New Types of Necessaries May Arise Despite the Fact That Maritime Law Historically Recognizes Maritime Liens for the Supply of Necessaries.

Decisions considering maritime liens frequently quote this Court's opinion in *The Yankee Blade*, 60 U.S. (19 How.) 82, 89 (1857) to the effect that maritime liens are "*stricti juris*" because they are secret liens and, thus, "cannot be extended by construction, analogy, or inference." In *Krauss Brothers Lumber Co. v. Dimon Steamship Corp.*, 290 U.S. 117, 125 (1933), this Court made clear that the Latin aphorism *stricti juris* "does not mean that the right to the [maritime] lien is not to be recognized and upheld, when within accepted supporting principles, merely because the circumstances which call for its recognition are unusual or infrequent." *Krauss Brothers* is this Court's most recent examination of the *stricti juris* principle.[20] The "accepted supporting principles" referred to in *Krauss Brothers* are that, in order for a claim to constitute a maritime lien, it must fall within a *category* of maritime liens which the general maritime

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[20] *See* GILMORE & BLACK, *supra* note 10 at 640-41.

law historically accepts or which the U.S. Maritime Lien Act specifically recognizes.[21]

One of these categories is "necessaries." 46 U.S.C. §971 (1982). Under the rule announced in *Krauss Brothers* and in circuit court opinions over the years, the *stricti juris* principle specifically permits liens to arise from the furnishing of necessaries to a vessel because necessaries are an historically recognized category of maritime lien. *Stricti juris* merely bars new *categories* of liens, such as liens arising from the breach of a partially performed contract of affreightment. *See Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490 (1923). Claims for breach of an executory contract fall outside every category of lien which the maritime law traditionally has recognized.

Indeed, this Court's denial of the lien sought in *Piedmont* could be explained on the basis that the contract in *Piedmont* to supply coal both to vessels and to a land-based power plant was an executory contract. The vessel owner already possessed coal from another supplier into which the libellant's coal was mixed, and there was no proof that the additional coal which the libellant supplied—and for which the libellant sought a lien—actually reached the vessels. The Court observed that the defect in the lien claim was not "in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libellant." *Piedmont*, 254 U.S. at 13. One difficulty with *Piedmont* is that its holding can be explained upon a number of differing points—not all of them consistent.

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[21] *See* Atlantic & Gulf Stevedores v. M/V GRAND LOYALTY, 608 F.2d 197, 201 (5th Cir. 1979); United States v. S.S. LUCIE SCHULTE, 343 F.2d 897, 899 (2d Cir. 1965); In re Admiralty Lines, Ltd., 280 F. Supp. 601, 604-05 (E.D. La. 1968), *aff'd.*, Admiralty Lines, Ltd. v. Cooper Stevedoring of Louisiana, Inc., 410 F.2d 398 (5th Cir. 1969); GILMORE & BLACK, *supra* note 10 at 636-40; 2 BENEDICT ON ADMIRALTY, *supra* note 10 at 3-1 to 3-70. For a discussion of types of maritime liens recognized within the category of "necessaries," *see id.* at 3-19 to 3-27.

The panel majority in *Char Ching* recognized and held that containers were "necessaries" to the arrested vessel. *Char Ching*, Pet. Brief App. at B-4 to B-5. However, contrary to *Krauss Brothers* and to decisions in the Fifth and Second Circuits,[22] the panel majority stated that a *stricti juris* analysis precluded liens arising *within* traditionally recognized categories of maritime liens for necessaries, despite changes in technology and in the operations of ocean carriers which made "necessary" things and services unknown to older case law. *Char Ching*, Pet. Brief App. at B-9 to B-11.

This holding will prevent maritime law from keeping pace with commercial realities. As this Court and courts of appeal often have observed, an essential feature of the maritime law is its capacity to grow so as to meet technological advances in maritime commerce. Considering the inherent flexibility of maritime law, the Second Circuit has observed that:

> American admiralty courts have from the earliest times since the founding of the Republic exercised their inherent powers to adjust American general substantive maritime law to new conditions by a process of development and elaboration . . ..

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 447 (2d Cir. 1959); *see United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970); *Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-32 (1959); *Saylor v. Taylor*, 77 Fed. 476, 479 (4th Cir. 1896). This Court has emphasized the importance of retaining this flexibility in "a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce." *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 691 (1950).

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[22] Atlantic & Gulf Stevedores v. M/V GRAND LOYALTY, 608 F.2d at 201; United States v. S.S. LUCIE SCHULTE, 343 F.2d at 899.

This Court should review *Char Ching* on *certiorari* because it conflicts with the specific principles of maritime liens, which this Court explained in *Krauss Brothers*, and because *Char Ching* is a pariah within the existing framework of the maritime law.

III.

The Court of Appeals Decision is Contrary to the Maritime Lien Act Because It Presumes That the Act Changed the Concept of "Furnishing" under Maritime Law in the Face of Express Congressional Intent Not to Alter That Law.

Congress had only three purposes when it passed the U.S. Maritime Lien Act in 1910. The first was to do away with the "home port doctrine."[23] The second was to eliminate the doctrine that, when a vessel owner (as distinct from the captain) contracted for necessaries, the supplier was presumed to rely on the credit of the owner and not on that of the vessel.[24] The third was to provide a single federal standard to override numerous state statutes which at the time provided "maritime" liens for a variety of goods and services supplied to a vessel within the jurisdiction of that state. *Piedmont*, 254 U.S. at 11. The committee reports of both the House and the Senate establish that Congress did not intend to make any other changes in the general principles of the existing law of maritime liens.[25]

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[23] The doctrine, announced in The General Smith, 17 U.S. (4 Wheat.) 438 (1819), provided that "when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises . . .." Piedmont, 254 U.S. at 11.

[24] This was related to the "home port doctrine." *See* Piedmont, 254 U.S. at 11.

[25] S. REP. NO. 831, 61st Cong., 2d Sess.; H.R. REP. NO. 272, 61st Cong., 2d Sess. This Court has twice observed that Congress expressly intended that the Maritime Lien Act not change the existing maritime law save for

The majority of the panel in *Char Ching* brushed aside the express Congressional intent and, instead, imputed a Congressional intent by resort to the grammar of the Act, noting that Congress used the verb "to furnish" as a gerund and not as a verb.[26] The panel majority speculated that, because Congress used "to furnish" in that fashion, Congress must thereby have intended to require "active forethought or advance identification of particular vessels in relation to 'necessaries' supplied." *Char Ching*, Pet. Brief App. at B-7.

However, the first commentator on the Act explained that:

> [t]he Act of Congress is perhaps open to criticism for not defining the meaning of the term "furnish." That an explicit definition of this word would be beneficial may be admitted, for there is at present a conflict of authority on the subject. . . . [T]he difficulty of determining just where the line should be drawn led to the omission of any definition in the law, and the courts, as heretofore, must decide upon the facts in each particular case.

Smith, *The New Federal Statute Relating to Liens on Vessels*, 24 Harv. L. Rev. 182, 200-01 (1911)(*cited with approval in Piedmont*, 254 U.S. at 11 n.3). The commentator, Mr. Fitz-Henry Smith, Jr., was a member of the Executive Committee of the Maritime Law Association of the United States (MLA) for three periods between 1911 and 1933, and was one of the three members of the MLA committee which drafted the Maritime

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the three ways discussed *supra*. W. A. Marshall & Co., Inc. v. The President Arthur, 279 U.S. 564, 568 (1929); Piedmont, 254 U.S. at 11. *See* GILMORE & BLACK, *supra* note 10 at 663; 2 BENEDICT ON ADMIRALTY, *supra* note 10 at 3-23 to 3-27.

[26] Char Ching, Pet. Brief App. at B-7. A computerized database search of federal and state court opinions as well as manual research reveals that the Court of Appeals decision is the first in the seventy-seven-year history of the Maritime Lien Act to draw significance from Congress' grammatical use in the Act of the verb "to furnish."

Lien Act. Congress adopted the MLA draft without material amendment. *See id.* at 182. Therefore, according to Mr. Smith (who, because of his work with the MLA drafting committee, was tantamount to being one of the drafters of the Act), Congress specifically omitted any definition of "furnishing."

Neither this Court nor any other circuit court has ever required the methodology of "furnishing" imposed by the Ninth Circuit. *Certiorari* is the only sure remedy for this anomaly.

IV.

The Court of Appeals Decision is Contrary to the Maritime Lien Act Because It Requires the Supplier of Necessaries to Prove Reliance on the Credit of the Vessel, When the Act States Expressly that the Supplier Need Not Make Such Proof.

The Maritime Lien Act states expressly that "[any] person furnishing . . . necessaries . . . to any vessel . . . shall have a maritime lien on the vessel . . . and *it shall not be necessary to allege or prove that credit was given to the vessel.*" 46 U.S.C. §971 (1982) (emphasis added). Although this language establishes a strong presumption that a maritime lien has arisen when a vessel receives or utilizes necessaries, Congress' latest amendment to the Act, in 1971, further strengthened the presumption.[27] The 1971 amendment eliminated the requirement that suppliers investigate, prior to supplying a chartered ship, whether the charter party contained a "no lien" clause. Under the amendment, a "no lien" clause will bar a lien only where

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[27] Congress has only amended the Act on one other occasion, in 1920, changing its original provision for liens to arise from the furnishing of "repairs, supplies, or other necessaries, including the use of dry dock or marine railway," to provide for maritime liens to arise from the furnishing of "repairs, supplies, towage, use of dry dock or marine railway, or other necessaries . . .." GILMORE & BLACK, *supra* note 10 at 657. Congress intended to broaden the "furnishing" requirement with that amendment.

a supplier has actual knowledge of the clause prior to supplying the chartered vessel. *See* 2 *Benedict on Admiralty*, *supra* note 10 at 3-41 to 3-42; *Gilmore & Black*, *supra* note 10 at 669-70.

The purpose of the Act, and of both the 1920 and 1971 amendments, was to expand the scope of maritime liens granted to suppliers of necessaries.[28] It was Congress' belief in 1971 that it was inequitable that suppliers be required to prove, each and every time they supplied necessaries, that a vessel's master, owner, or authorized agent had hypothecated the ship in exchange for the specific supply of necessaries.[29] The Act as amended thus places squarely on the shipowner the burden of disproving the lien. *Farrell Ocean Services, Inc. v. United States*, 681 F.2d 91, 93 (1st Cir. 1982); *accord, Gulf Trading & Transportation Co. v. Vessel Hoegh Shield*, 658 F.2d 363 (5th Cir.), *cert. denied*, 457 U.S. 1119 (1981); *see* Ray, *Maritime Contract Liens*, 47 Tul. L. Rev. 587, 597-99 (1973).

Char Ching ignores that express provision of the Act and substitutes a conflicting requirement that, in order to have a maritime lien for necessaries, a container lessor must demonstrate that he furnished the necessaries on the specific credit of the predesignated vessel.

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[28] The Ninth Circuit itself recognized this in Farwest Steel Corp. v. Barge Sea-Span 241, 769 F.2d 620, 623 (9th Cir. 1985) but apparently ignored this recognition two years later in Char Ching. For further discussion of the purpose of the 1971 amendments to the Act, *see* GILMORE & BLACK, *supra* note 10 at 652-53; 669-70; *see also* Gulf Oil Trading Co. v. M/V CARIBE MAR, 757 F.2d 743, 747-49 (5th Cir. 1985); Atlantic & Gulf Stevedores v. M/V GRAND LOYALTY, 608 F.2d at 201-02; Lake Union Drydock Co. v. V/N Polar Viking, 446 F. Supp. 1286, 1289-90 (W.D. Wash. 1978); Nacirema Operating Co. v. S.S. Al Kulsum, 407 F. Supp. 1222, 1225-26 (S.D.N.Y. 1975).

[29] The House Committee on Merchant Marine and Fisheries concluded that it would be more equitable to make the owner, as opposed to the supplier, bear any loss arising out of the furnishing of necessaries to a ship, since:

> [a]s a practical matter, the owner can more easily protect himself by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes necessaries to a vessel under great economic pressure to put back to sea.

H.R. REP. NO. 92-340, 92d Cong., 1st Sess. 1, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1363.

V.

The Court of Appeals Decision Raises the Important Question of When a Maritime Lien for Necessaries Arises, a Question Which *Piedmont* Confused and Which This Court Should Now Clarify on *Certiorari*.

Piedmont, the only decision of this Court to consider the "furnishing" requirement of the Act, is replete with contrary dicta. The resulting confusion during the opinion's sixty-seven-year life is illustrated by a series of cases which have viewed *Piedmont* to stand for conflicting propositions,[30] as well as by the reliance by the *Char Ching* majority on one set of *Piedmont* dicta, and reliance by the dissent on another set of dicta of equal rank.[31] Indeed, the confusion surrounding *Piedmont* apparently led the *Char Ching* majority to misread *Dannebrog*, this Court's only description of *Piedmont*. However, *Dannebrog* supports

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[30] *See* Jeffrey v. Henderson Brothers, 193 F.2d 589 (4th Cir. 1951); Bankers Trust v. Hudson River Day Line, 93 F.2d 457 (2d Cir. 1937); Kopac Int'l v. Bold Venture, 1987 A.M.C. 192, 194 (W.D. Wash. 1986); Bellingham Nat'l Bank v. Oil Screw Pacific Horizon, 587 F. Supp. 26, 28-29 (W.D. Wash. 1984); Walter E. Heller & Co. v. M/V Mr. Ed, 273 F. Supp. 926, 928 (E.D. La. 1967); Brock v. S.S. Southampton, 231 F. Supp. 280, 282 (D. Ore. 1964); Davis v. U.S. Gas Screw Nola Dare, 125 F. Supp. 677, 678 (E.D.N.C. 1954); American Stevedores, Inc. v. The Trajan, 118 F. Supp. 608, 610 (E.D.N.Y. 1954); The American Eagle, 30 F.2d 293, 295 (D. Del. 1929).

[31] The dissent quoted the following from *Piedmont* to support the lessor's maritime lien:

> [T]he fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the [Maritime Lien Act] for supplies furnished to the others, even if the supplies are furnished to all upon the orders of the owner under a single contract . . . each vessel so receiving supplies may be made liable for the supplies furnished to it.

Piedmont, 254 U.S. at 10-11, quoted in Char Ching (dissent), Pet. Brief App. at B-13. In contrast, the majority characterized Piedmont as follows in holding that no lien existed:

the concept of a maritime lien for container lessors. This Court in *Dannebrog*, 310 U.S. at 276-77, explained that *Piedmont* denied a lien to the coal supplier libellants because 1) the libellants had no understanding, either at the time that the contract was made or at the time that the coal was delivered, that any part of it was for any particular vessel *or even for vessels composing a fleet*, and 2) the parties clearly understood that the defendant shipowner would use the coal in part to fuel its shoreside power plant. Here, the lessors—as well as the ocean carrier—always understood that the lessors furnished containers for the lessee's fleet of six identifiable vessels. The lessors kept detailed records of which containers the shipping line withdrew from the lessors' depots, and the lessors can prove exactly which containers were used aboard the arrested vessel.

The leading modern commentators on admiralty have observed of *Piedmont* that:

> [a]s was his habit, Justice Brandeis in the course of a moderately long opinion multiplied the facts that might be considered significant . . .. By the time he had finished, not even the purest legal genius could have declared which of these multiple facts, or which combination of them, had resulted in the denial of lien. Consequently the case, in its specific context of supplies furnished to a fleet of ships, has ever since proved slippery precedent to the counsel and lower court judges who have wrestled with it. The *Piedmont* case is all things to all men and is regularly cited on both sides of every case in which it is relevant: since some of Justice Brandeis' facts are always present, it is an authority for shipowners' counsel for denial of the lien; since all of them are never present, it is equally an authority for the suppliers' counsel in favor of the lien.

In *Piedmont*, the Supreme Court denied maritime liens sought against vessels that had received coal which had been sold to the vessels' owner on credit. The defect was not "in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libellant."

Char Ching, Pet. Brief App. at B-8, quoting Piedmont, 254 U.S. at 13.

Gilmore & Black, supra note 10 at 661.

This Court on *certiorari* should clarify *Piedmont* in respect of the "furnishing" requirement of the Act, giving due regard to the developments in the maritime industry since 1920 and to the importance of containerization to modern ocean commerce. The meaning of this "furnishing" requirement is an important question of federal law because "furnishing" is the operative term of the Act. Because the question on *certiorari* focuses only on the meaning of that word in the Act, this case presents a particularly appropriate opportunity to clarify a term which has remained cloudy for almost seventy years.

VI.

The Court of Appeals Decision Makes Disuniform the Previously Uniform Maritime Law That a Maritime Lien Will Arise for the Breach of a Container Lease.

Each of the three published district court decisions which has considered the question has recognized a maritime lien for the breach of a container lease.[32] No case known to *Amicus*, save for the panel majority opinion in *Char Ching*, has ever held against the lien.

The general maritime law of the United States is a single, uniform body of law which must be *kept* uniform in order to assure the smooth operation of the maritime industry. The need for uniformity is the central reason for the creation of separate

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[32] Flexi-Van Leasing, Inc. v. M/V C.C. San Francisco, 628 F. Supp. 1077 (C.D. Cal. 1985) (the trial court decision overturned by Char Ching, Pet. Brief App. D); Nautilus Leasing Services v. M/V COSMOS, 1983 A.M.C. 1483 (S.D.N.Y. 1983) (not otherwise reported); and Transamerica ICS, Inc. v. M/V PAN-ATLANTIC, 1984 A.M.C. 489 (S.D. Fla. 1983) (not otherwise reported). Several unpublished decisions of other district courts, cited at *Ocean Container Leasing and Maritime Liens, supra* note 7 at n.59, have also accorded maritime lien status to container lessors.

admiralty jurisdiction under the Constitution and the reason that the general maritime law is binding on every court (including state courts) in the United States.[33] It is also, of course, important that the construction of a significant federal statute, such as the Act, not vary from court to court. This Court, therefore, should grant the writ so as to restore uniformity to maritime law and to the construction of the Act.

CONCLUSION

The decision below conflicts with decisions of this Court and with decisions of other courts of appeal. It makes disuniform what had been the uniform U.S. maritime law that a maritime lien arises as the result of the breach of a container lease. The decision raises the important federal law question of when a maritime lien for the "furnishing" of necessaries arises—a question left in confusion by *Piedmont*—which this Court should take the opportunity to clarify.

Amicus, therefore, requests that this Court grant the Petition for a Writ of *Certiorari* and overturn the ruling below.

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[33] *See* Detroit Trust v. The Thomas Barlum, 293 U.S. 21, 42-44 (1934); Dravo Corp. v. Maxin, 545 F.2d 374, 377-79 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

Exhibit A

Members of the
Institute of International Container Lessors, Ltd.

CLOU CONTAINER LEASING GmbH
Hamburg, Federal Republic of Germany

FLEXI-VAN LEASING, INC.
New York, New York

GELCO CTI CONTAINER SERVICES, INC.
Eden Prairie, Minnesota

INTERPOOL LIMITED
New York, New York

ITEL CONTAINERS INTERNATIONAL CORPORATION
San Francisco, California

NAUTILUS LEASING SERVICES, INC.
San Francisco, California

SEA CONTAINERS, LTD.
London, England

TEXTAINER INCORPORATED
New Malden, Surrey, England

TRANSAMERICA ICS, INC.
White Plains, New York

TRANS OCEAN LEASING CORPORATION
San Bruno, California

TRITON CONTAINER INTERNATIONAL, LTD.
San Francisco, California

XTRA CORPORATION
Boston, Massachusetts